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Supreme Court of the United States.

OCTOBER TERM, 1966.

No. 547

LAWRENCE F. O'DONNELL,
Petitioner,

v.

PAUL A. SULLIVAN, SPECIAL AGENT, INTERNAL REVENUE SERVICE, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

LAWRENCE F. O'DONNELL,
One State Street,
Boston, Massachusetts 02109,
Attorney for Petitioner.

Of Counsel:
MITCHELL G. HADGE,
JOHN B. GREENE,
Boston, Massachusetts.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

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No.

LAWRENCE F. O'DONNELL,
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v.

PAUL A. SULLIVAN, SPECIAL AGENT, INTERNAL REVENUE SERVICE, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Opinions Below.

The opinion of the United States District Court for the District of Massachusetts, entered January 25, 1966 (R. 445-452), is not yet reported. The opinion of the Court of Appeals for the First Circuit, entered July 11, 1966, is not yet officially reported, but is annexed hereto as Appendix A.

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered July 11, 1966 (Appendix B). The jurisdiction of the Court is invoked under 28 U.S. Code, § 1254 (1).

Statute Involved.

The pertinent statutory provision, Section 7602, 26 U.S. Code, Internal Revenue Code of 1954, is set forth in Appendix C.

Questions Presented.

1. Where an administrative summons is issued under Section 7602 to examine the personal bank account of a taxpayer and also an account entitled "Client's Account," and where the initial investigation of the taxpayer was not initially routine but originated in the Organized Crime Division, Internal Revenue Service, whether in these circumstances the rights of the appellant under constitutional amendments IV, V, and IX have been violated.

2. Whether bank statements showing deposits, other credits, checks, other charges, debit memos, deposited items, credit memos, deposit tickets and films thereof, in an account entitled "Client's Account," are the property of the clients of the taxpayer under the confidential relationship of attorney and client and are not subject to an administrative summons under Section 7602, and more especially where the initial investigation was not initially routine but originated in the Organized Crime Division, Internal Revenue Service.

3. Where the initial investigation of a taxpayer was not initially routine but originated in the Organized Crime Di-

vision, Internal Revenue Service, and where the taxpayer's returns were kept in that division from September, 1963, to January, 1964, and where these returns were intermingled in the same file of a taxpayer who was being investigated by the Organized Crime Division, and where the taxpayer, who is an attorney at law, represented seventeen third-party witnesses in connection with prior third-party hearings, whether, in these circumstances, there are warrantable inferences that the issuance of the instant summons (*a*) was with the intent and hopeful expectancy to uncover material for a preconceived desire for a criminal prosecution; (*b*) was with the consent and approval of the Organized Crime Division; (*c*) was upon the instigation of the Organized Crime Division; (*d*) was upon the advice of the Organized Crime Division; (*e*) was upon the design, conception, desire, and will of the Organized Crime Division; (*f*) was a ruse and sham inspired by the Organized Crime Division.

4. Where subpoenas duces tecum were directed to various witnesses, all of whom were employees of the Internal Revenue Service, and where during their examination in chief by the appellant the Court on several occasions refused to order the complete production by the witnesses of certain of the records called for by the subpoenas but entered an order modifying the same, and where the appellant on several occasions informed the Court that his examination of these witnesses was thereby unduly restricted and hampered by the modification which prevented a full disclosure of the salient facts upon which his cause of action rested, and where the appellant has reasonable cause to believe that a full disclosure of the records called for by the subpoenas would aid and assist him in the prosecution and determination of his cause of action, whether in these circumstances the order of modification of the trial Court was justified and was not prejudicial to the appellant.

Statement of the Case.

The Organized Crime Division of the Internal Revenue Service had therein a Special Agent John B. Flattery, who was assigned as case supervisor of the investigation of Bernard G. McGarry on January 25, 1962 (R. 158). Working under him on the McGarry case was Special Agent Robert Ferrick, who was also a member of the Organized Crime Division (R. 121, 122).

The Attorney General of the United States requested the Internal Revenue Service to give top priority to the investigation of the tax affairs of major racketeers as a part of the Government's drive against organized crime (R. 412). As a result, on February 24, 1961, the Internal Revenue Service created the Organized Crime Division (R. 413) to maintain complete co-operation at the working level with the attorney or attorneys assigned by the Department of Justice, and the tax returns of major racketeers identified by the Department of Justice are to be subjected to the "saturation type" investigation, including the use of electronic equipment and other technical aids as well as such investigative techniques as surveillance, under-cover work, etc. (R. 414).

There are two ways whereby the Internal Revenue Service can begin an Organized Crime investigation. One is that the taxpayer is identified by the Department of Justice and the other upon recommendation by the Organized Crime Division that the matter has CRIMINAL POTENTIAL (R. 216).

During the McGarry investigation between December, 1962, and September 9, 1963, a number of third-party witnesses were summoned and the appellant, an attorney, represented seventeen such persons before Special Agents Flattery and Ferrick (R. 123, 345). The appellant was not attorney for McGarry (R. 299).

On September 9, 1963, Agent Ferrick requested that the tax returns of the appellant for the years 1956 through 1962 be forwarded to him from the office of the District Director, Internal Revenue Service (R. 13), to determine if the appellant was attempting to collect a file to defend the taxpayer, McGarry (R. 171).

The returns of the appellant were maintained by the Organized Crime Division until January, 1964 (R. 132), as a part of the McGarry case, and during that period, at the request of the Organized Crime Division, a revenue agent assigned to that Division analyzed the tax returns of the appellant (R. 178), an inquiry was made to verify the contents of the return, and Agent Flattery expressed the intention to have an agent audit the returns (R. 180).

Since that time the tax status of the appellant has been under investigation—in 1964 by the Audit Division (R. 289) and thereafter by the Intelligence Division, with the respondent Sullivan having it assigned to him on October 26, 1965 (R. 284), from Agent Dieso of the Intelligence Division, to whom it had been assigned on January 20, 1965 (R. 230).

On November 12, 1964 Revenue Agent Farrell served a summons on the First National Bank of Boston for the production of the records of the appellant, and such summons indicated that the appellant's tax liability was under investigation for the years 1962 and 1963 (R. 420, 421). The records were made available by the bank (R. 267).

On February 1, 1965, Agent Dieso served a similar summons on the First National Bank of Boston, which summons indicated that the investigation concerned the period 1959 to 1963, inclusive (R. 429, 430). The records were made available by the bank (R. 267).

On October 28, 1965, the respondent Sullivan issued a similar summons on the First National Bank of Boston, which summons indicated that the investigation concerned

the periods 1961, 1962, and 1963. The summons called for the records pertaining to the appellant's account and the appellant's client's account (R. 10, 11).

On November 9, 1965, the appellant filed a petition to enjoin the respondent Sullivan, and included therein as respondent the First National Bank of Boston, inasmuch as the latter intended to comply with the summons (R. 5-6). A temporary restraining order was issued on November 10, 1965, restraining the bank's compliance (R. 14).

Subpoenas duces tecum were issued for nine employees of the Internal Revenue Service to produce various records in their possession concerning the appellant and the creation and purpose of the Organized Crime Division (R. 20-33). Motions were filed to quash each subpoena, with various reasons set forth (R. 459-489). The Court held the motions in abeyance (R. 37), and, in the course of hearing, the Government offered to produce all documents pertaining to the appellant for the Court's private inspection (R. 68). The Court stated, when the issue of compliance was again raised, that the appellant may have produced that which related to him that was relevant, but the Court would first determine if it was relevant to the issues (R. 89).

The Government thereafter withdrew its offer to produce the records (R. 91) and the Court stated that it would take same under advisement (R. 99). Continuing through the hearing, the Court would not allow production of records until after the witness had been examined and the Court would determine the documents that should be produced. Thereafter the Court ordered the production of certain documents (R. 315-335), but restricted examination of witnesses rigidly to the contents of the document (R. 337).

Throughout the examination of the subpoenaed witnesses, Government employees, the Court ruled that the appellant, having subpoenaed such witnesses, could not cross-examine

them, as they were not, in the Court's opinion, hostile witnesses.

Reasons for Granting the Writ.

The question whether an administrative subpoena under Section 7602 can be used to investigate records in a bank in an account entitled "Client's Account" has never been specifically adjudicated.

The case of *Foster* v. *United States,* 265 F. 2d 183, is distinguished on the grounds that the subpoena was directed to the personal account of the taxpayer, as also to the corporate records, to "authenticate the exclusion of income claimed by the taxpayer to have been received as salary from the Foster Construction C.A. since its inception, and afford the only opportunity for the government to determine whether the income received by the taxpayer from the Foster Construction C.A. actually represents salary or the distribution of profits in the form of salary."

The case of *Application of Cole,* 342 F. 2d 5, is distinguished on the grounds that "none of the material sought belonged to the taxpayers or involved the work product of their attorneys. They had no interest in any of them in the sense that they had a right to any of them."

It was said in *Tillotson* v. *Boughner,* 350 F. 2d 663:

> "The decision in Baird v. Koerner, supra, has been on the books for almost four years. Various points in the opinion have been cited in court decisions. But the primary holding that the identity of the client, under the facts of that case, was within the attorney-client privilege, has not been criticized. In fact, the decision in Baird was expressly followed. See N.L.R.B. v. Harvey, D.C.W. Va., 235 F. Supp. 580, 583-584 (1964)." (*Baird* v. *Koerner* (9 Cir.), 279 F. 2d 623.)

When the bank accepted the opening of an account entitled "Client's Account" it had knowledge of the attorney-client relationship, which gave it no greater rights than an agent would have under similar circumstances when appointed by an attorney.

The subpoenas to the bank required the production, *in re* "Client's Account," of—

1. Films of bank statements in the name of "Lawrence F. O'Donnell—Client's Account," showing deposits, other credits, checks, and other charges;
2. Films of checks and debit memos charged to check account number 516-1712, in the name of "Lawrence F. O'Donnell—Client's Account";
3. Films of deposited items and credit memos credited to the check account number 516-1712 in the name of "Lawrence F. O'Donnell—Client's Account";
4. Deposit tickets showing items deposited and credited to check account number 516-1712 bearing the name "Lawrence F. O'Donnell—Client's Account."

Barring the element of provable or probable fraud, with proper judicial safeguards prior to the use of administrative subpoena power under Section 7602, there is no authority under the Internal Revenue Code of 1954 for such investigation, which could only lead to a compulsory disclosure of names of clients, and their financial status. This would seem to your petitioner not to be within the intent of Congress in allowing administration subpoena power under Section 7602.

Even subpoenas to produce before a Grand Jury, if the material sought is protected by the attorney-client privilege, cannot effectively breach such relationship. *United States* v. *Judson* (9 Cir.), 322 F. 2d 460 (1963). Surely, an administrative subpoena under Section 7602 cannot have

any greater rights than a subpoena issued during a Grand Jury investigation.

In respect to the subpoenas issued by the petitioner:

In the eternal search for truth, it seems not open to argument that the Federal Rules of Civil Procedure have greatly liberalized the pre-trial deposition-discovery mechanism established by Rules 26 to 37, which have become one of the most significant innovations of the Federal Rules of Civil Procedure.

Rule 45 (b) provides as follows: "(b) FOR PRODUCTION OF DOCUMENTARY EVIDENCE. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things."

Appellant's frequent claims that the denial, restriction, and modification by the Court of his subpoenas duces tecum unduly prejudiced the trial of his case, and caused him hardship and injustice, were sufficient grounds for the Court to sustain the subpoenas in their entirety, there being lacking any unreasonable, oppressive, annoying, or embarrassing circumstances.

The liberal and vital role of the rules in the pre-trial deposition-discovery must be construed with and read *in pari materia* with Rule 45, which provides for the issuance of subpoenas during trial, so that civil trials in the Federal Courts need no longer be carried on in the dark.

Rule 26 (b) reads as follows: "(b) SCOPE OF EXAMINATION. Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined re-

garding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

The Court had this to say in *Hickman* v. *Taylor*, 329 U.S. 495, on pages 507-508: "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. But discovery, like all matters of procedure, has ultimate and necessary boundaries. As indicated by Rules 30 (b) and (d) and 31 (d), limitations inevitably arise when it can be shown that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry. And as Rule 26 (b) provides, further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege."

The subpoenaes issued in this case were reasonably certain and particular in their designation. It was impossible

for the petitioner to be absolutely precise in specifying the records desired. In asking for all material concerning Lawrence F. O'Donnell there was no basis for question by any witness as to what he was required to produce. What is reasonable is determined by no fixed standard, but by circumstances shown in respect to each case.

It has been held that, if the administration of justice requires discovery and the documents sought are directly in issue, they should be produced unless grave overriding reasons in the public interest require secrecy. Unless a subpoena for the production of documentary material is both unreasonable and oppressive, it should be effectuated by the Court unless, under applicable and lawful consistent executive regulations, the Court, after judicial scrutiny, concludes that the national interest or the specific situation embodied in the record before the Court justifies withholding discovery.

The petitioner contends that, when the trial Court held a conference in his chambers, at which time the United States Attorney moved to quash the subpoenas, the Court should have assumed a clear and crystal position. The Court should have at that time—to assure a fair and impartial disposition—rendered a decision: either quash the subpoenas, allow the subpoenas, or, with modification in mind, order a production for the Court in camera examination for a determination of the pertinent, relevant, and permissible records.

The record will show that from September 9, 1963, to January, 1964, the tax returns of the petitioner were in the file of one Bernard G. McGarry, who was being investigated by the Organized Crime Division, the petitioner's returns having been requisitioned by the Organized Crime Division (R. 128, 172, 174).

The Organized Crime Division had knowledge that the petitioner represented, as attorney, seventeen third-party

witnesses in connection with the McGarry investigation during the period December, 1962, through January, 1964 (R. 123, 345).

Just prior to requisitioning the petitioner's tax returns on September 9, 1963, namely on September 4 and September 8, 1963, Special Agent Ferrick of the Organized Crime Division submitted a derogatory report on your petitioner (R. 346, 347; R. 416-419, Ex. 1).

This derogatory report stated that the petitioner was rude, insulting and unethical, all because the petitioner conducted a vigorous presentation of the legal rights of his clients.

This, then, was the climate preceding the requisitioning of the tax returns of the petitioner and which led to an accountant's analysis of the petitioner's tax returns (R. 349, 355, 359, 361).

The subsequent full inquiry into the petitioner's tax returns, though relied on by the respondent as being routine, were in spirit and in fact a continuation of an investigation not initially routine nor authorized by law.

Petitioner claims that he was the subject of an arbitrary bad-faith Organized Crime investigation by the Internal Revenue Service in violation of Title 26 U.S.C. (*United States* v. *Ryan,* 320 F. 2d 500, aff'd 379 U.S. 61, 85 S. Ct. 232). When the Organized Crime Investigator Ferrick filed the derogatory report on petitioner, for which there is no authority in Title 26, and arbitrarily took possession of his tax returns and kept them for several months, an illegal criminal investigation was thereby being conducted concerning petitioner. His tax returns were analyzed by an accountant of the Organized Crime Division; the usual sheets were prepared and items of deduction were checked out. This entire bad-faith criminal investigation by the Internal Revenue Service was initiated because witnesses saw fit to exercise their constitutional right to engage a

lawyer. Whatever power the Internal Revenue Service has is contained in Title 26, and Congress never granted them the power to join with law enforcement agencies to make up the Organized Crime Division. The acts of the Organized Crime Division as such are illegal. Furthermore, their acts in regard to petitioner were in bad faith, illegal, and designed to discourage and intimidate petitioner in his role as a lawyer in behalf of third-party witnesses. This was not a mere depositing of petitioner's tax returns in the Organized Crime Division; it was an active bad-faith pursuance of a criminal investigation, with increasing intimidation of those who dissent.

The Organized Crime Division has no justification or existence under the Internal Revenue Code of 1954. This Court said in *Commissioner of Internal Revenue* v. *Tellier*, 383 U.S. 687, 695: "We decline to distort the income tax laws to serve a purpose for which they were neither intended nor designed by Congress." By analogy the language of the Court would apply to the instant case.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LAWRENCE F. O'DONNELL,
One State Street,
Boston, Massachusetts 02109,
Attorney for Petitioner.

Of Counsel:
MITCHELL G. HADGE,
JOHN B. GREENE,
Boston, Massachusetts.

Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6699.

LAWRENCE F. O'DONNELL,
PETITIONER, APPELLANT,

v.

PAUL A. SULLIVAN,
SPECIAL AGENT, INTERNAL REVENUE SERVICE, ET AL.,
RESPONDENTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge.*
McENTEE and COFFIN, *Circuit Judges.*

Lawrence F. O'Donnell, Mitchell G. Hadge and *John B. Greene* on brief for appellant.

W. Arthur Garrity, Jr., United States Attorney, and *Edward F. Harrington*, Assistant U.S. Attorney, on brief for appellees.

OPINION OF THE COURT.

July 11, 1966.

COFFIN, *Circuit Judge.* This is an appeal from a denial of a petition to enjoin the Internal Revenue Service from further investigating the tax liability of appellant and to

enjoin a bank from responding to an IRS summons requiring the production of bank records relating to appellant.[1]

The contentions of appellant are: (1) that the bank records were property of appellant's client, were protected by the attorney-client relationship, and that enforcement of the summons would constitute unreasonable search and seizure; (2) that the Internal Revenue Service is misusing its powers under Section 7602 in that its real motive is to lay the basis for a preconceived criminal prosecution against appellant; and (3) that the district judge erred and showed partiality in modifying the scope of discovery sought by appellant through nine *subpeonae duces tecum*.[2]

The relevant facts as to the bank records issue are that a summons was issued to the assistant cashier of the First National Bank of Boston requiring him to produce for examination films of bank statements for the years 1961, 1962, and 1963 of checking accounts entitled "Lawrence F. O'Donnell" (appellant) and "Lawrence F. O'Donnell—Client's Account", and also films of checks and debit memos charged to the former account. Neither the bank nor the assistant cashier is a client of appellant.

Appellant cannot claim these records, kept by the bank for its own purposes, as his property. Nor can he invoke the attorney-client privilege. These were not confidential communications to an attorney by a client. They had already been disclosed to a third party, the bank. They

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[1] This opinion arises out of the same general subject matter as that giving rise to *McGarry* v. *Riley*, 4 Cir., 1966,—F.2d—, issued this date, in which we have indicated the other chapters of this extended litigation at n. 1.

[2] These three claims are distilled from thirteen points stated as the basis of appeal. A fourth claim, that the district judge refused to act on appellant's requests for rulings of law, was properly not briefed since the lower court's opinion was in effect a disposition of the issues so raised. A fifth point of appeal, challenging a ruling by the court that Internal Revenue agents subpoenaed by appellant were his witnesses, was also not briefed or argued.

were not the property of a client. These circumstances fall far short of cases where accounting and tax papers relating to a client were held subject to summonses even though in the possession of the attorney.[3]

As was said in *Schulze* v. *Rayunec*, 7 Cir., 1965, 350 F.2d 666, 668, where the court ordered the production under summons of records relating to a cashier's check caused to be issued by a lawyer for an unnamed client, "we do not think . . . [the attorney] can clothe the bank records with the . . . [attorney-client] privilege under the facts and circumstances of this case."

Moreover, appellant has no more standing to object to the summons on the bank than the taxpayers in *Application of Cole*, 2 Cir., 1965, 342 F.2d 5, *cert. denied*, 381 U.S. 950; *De Masters* v. *Arend*, 9 Cir., 1963, 313 F.2d 79, *petition for cert. dismissed*, 375 U.S. 936; or *Foster* v. *United States*, 2 Cir., 1959, 265 F.2d 183, *cert. denied*, 360 U.S. 912. See also *Stone* v. *Williams*, 1 Cir., 1966, 356 F.2d 934.

Appellant's contention that Section 7602 is being used to serve the purposes of a criminal prosecution conceived by the Organized Crime Division of IRS is similarly unsupported. The district judge found, and the lengthy record amply supports his findings, that the investigation of appellant had several proper and non-conspiratorial sources. Appellant's 1962 return was chosen for examination because of a large bank deposit consisting mostly of bills of $100 or more. His 1963 return was chosen for audit by an agent who had no knowledge of the prior selection, as the result of a routine classification of a block of returns, where claimed deductions for medical expenses and Schedule C reporting of business income and expendi-

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[3] *Bouschor* v. *United States*, 8 Cir., 1963, 316 F.2d 451; *Colton* v. *United States*, 2 Cir., 1962, 306 F.2d 633, *cert. denied*, 371 U.S. 951; *In the Matter of Wasserman*, D. D.C., 1961, 198 F. Supp. 564; *cf. United States* v. *Judson*, 9 Cir., 1963, 322 F.2d 460.

tures indicated the desirability of checking. This investigation of appellant's 1962 and 1963 returns is the only one in which appellant is involved. It has been assigned to the Intelligence Division of IRS because of possible understatement of appellant's gross receipts. Appellant has refused to produce his books and records and the bank summons has issued as we have noted above. This investigation, therefore, is far from complete, with no determination of liability having been made and, as the district court found, no evidence that criminal charges are being considered.

A peripheral examination of appellant's returns was made by agents within the Intelligence Division assigned to the Organized Crime Drive in connection with the tax liability of Bernard G. McGarry. Appellant did not then represent McGarry, but did represent seventeen witnesses (of whom twelve were related to McGarry by blood or marriage) who had been summoned in the McGarry investigation. Appellant's returns for the years 1956-1962 were scrutinized by these agents for the purpose of checking any business connection or financial transactions between McGarry and appellant as they might bear on McGarry's tax liability. The returns disclosed no such connection. They were not checked for correctness and were ultimately returned to file. None of the agents connected with the Organized Crime Drive Group have taken any part in the current investigation of appellant's 1962 and 1963 returns.

What we have said in *McGarry* v. *Riley, supra,* applies *a fortiori* to this issue. In *McGarry,* there were mixed criminal and civil aspects of the investigation which we held did not constitute misuse of Section 7602. Here the civil aspects have so far clearly been not only present but dominant if not exclusive.

Appellant's final contention is that the district court erred to the extent of partiality in modifying the scope of

documents produced in response to his numerous *subpoenae duces tecum*. The nine subpoenae asked, among other records, for all diaries (official and personal) and work sheets covering four years, and all notes during attendance at various schools. The requests were made without limitation to matters related to appellant. The district judge, faced with what might well be considered frivolous requests, exercised admirable patience in giving every opportunity to appellant to designate documents. The appellant failing to do this, the judge ordered all relevant documents to be produced. Appellant was allowed to place them in evidence and recall witnesses for further questioning based on the documents. Clearly there was no error and only such partiality as indulged the appellant.[4]

Affirmed.

[4] Having been confronted in this appeal by a record of 457 pages and a 52 page brief for appellant in which only three cases, not particularly pertinent, were cited, we can only respect the patience demonstrated by the district court.

Appendix B.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6699.

LAWRENCE F. O'DONNELL,
Petitioner, Appellant,
v.
PAUL A. SULLIVAN, Special Agent,
Internal Revenue Service, ET AL.,
Respondents, Appellees.

JUDGMENT

July 11, 1966.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was submitted on briefs by leave of Court.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk.

Appendix C.

26 U.S. CODE, SECTION 7602,
INTERNAL REVENUE CODE OF 1954.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, de-

termining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 547

LAWRENCE F. O'DONNELL, PETITIONER

v.

PAUL A. SULLIVAN, SPECIAL AGENT, INTERNAL REVENUE SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 14–18) is reported at 364 F. 2d 43. The opinion of the district court (R. 445–452)[1] is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1966 (Pet. 19). The petition for a writ of certiorari was filed on September 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." references are to the "Record Appendix to Brief for Appellant" filed in the court of appeals.

237-970—66

QUESTIONS PRESENTED

1. Whether petitioner, an attorney whose income tax returns were being investigated, could invoke the attorney-client privilege to prevent a bank from complying with an Internal Revenue Service summons requesting production of the records of a checking account entitled "Client's Account" which he maintained.

2. Whether the district court should have enjoined a bank from complying with an Internal Revenue Service summons because petitioner alleged—contrary to the facts of record—that the investigation was designed to harass him.

3. Whether the district court erred in limiting the extent of petitioner's discovery.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any offi-

cer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(26 U.S.C. 7602.)

STATEMENT

Petitioner, an attorney, filed a suit in the district court, seeking (1) to enjoin employees of the Internal Revenue Service from continuing an investigation of petitioner's tax liabilities and (2) to enjoin the assistant cashier of the First National Bank of Boston from complying with an Internal Revenue Service summons calling for the production of certain bank records (R. 5–9, 445). The summons requested the bank to produce statements of a designated checking account in the name of "Lawrence F. O'Donnell—Client's Account," for the years 1961, 1962, and 1963, and microfilms of checks, deposit slips, etc., relating to that account (R. 19–20).[2] Petitioner alleged that

[2] The summons also called for bank statements pertaining to another account in the name "Lawrence F. O'Donnell" (R. 19).

he had "the rights to such records," that production would violate the attorney-client privilege and "the constitutional rights of your Petitioner," and that the summons had been issued to harass and destroy petitioner and in order to investigate crime (R. 5–9).[3]

Prior to a hearing on the request for an injunction, petitioner caused subpoenas to be served on various personnel of the Internal Revenue Service requiring the production, *inter alia,* of official and personal diaries, chronological work sheets, and notes from Treasury schools (R. 20–33). Prior to the hearing, the district court stated that only relevant records, specifically designated at the hearing, would be ordered produced in response to petitioner's subpoenas (R. 40–41). During the hearing, the court ordered that all entries in agents' diaries relevant to the issues be produced, together with an affidavit from the Assistant United States Attorney that nothing else was relevant (R. 324–335). Petitioner was given an opportunity to examine each witness with respect to any relevant material in the diaries (R. 335–344), the full diaries being in court (R. 337, 344).

After five days of hearings (R. 3–4), at which numerous Internal Revenue Service personnel testified

[3] The petition also noted (R. 8) that a contempt proceeding was pending against petitioner "on matters arising out of your Petitioner's functions as an attorney for the taxpayer referred to herein." The taxpayer mentioned is evidently Bernard G. McGarry. See *McGarry* v. *Riley*, No. 548, this Term, in which a petition for a writ of certiorari was filed by attorney Lawrence F. O'Donnell (petitioner herein) on the same day as the instant petition.

(R. 43–412), the district court rendered an opinion dismissing the petition (R. 445–452). The court found: (1) that "The records in question are clearly the property of the bank" (R. 451); (2) "that there is no connection between the present investigation * * * and the activities of the Organized Crime Drive Group" (R. 448); (3) that petitioner's returns were selected for examination in a purely routine fashion (R. 445–446); (4) that there "is no evidence that at the present time the making of any criminal charges is under consideration" (R. 449); and (5) that "there is nothing to show that this investigation is not, as it purports to be, a genuine inquiry to determine the correctness of petitioner's tax returns" (R. 449). The court of appeals affirmed (Pet. 18).

ARGUMENT

Petitioner contends that the requested injunction should have been granted (1) because the bank's records concerning his accounts were protected by the attorney-client privilege (Pet. 7–9), and (2) because the entire investigation was unlawful, having as its purpose harassment and the discovery of crime (Pet. 11–13). He also contends that his subpoenas were unduly restricted (Pet. 9–11). None of these contentions has merit or warrants further review.[4]

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[4] Petitioner's complaint sought an injunction against officers of the United States, as well as against an officer of the bank. This Court has held that no such action will lie against officers of the Internal Revenue Service, since petitioner has other available remedies. *Reisman* v. *Caplin*, 375 U.S. 440. Thus, if petitioner feared that the bank would voluntarily turn over its records to the Service, he was entitled, upon a showing that his legally protected rights might thereby be violated, to

1. Petitioner cannot invoke the attorney-client privilege here. The Internal Revenue Service merely seeks to ascertain, by means of bank records, whether the money which petitioner deposited in the bank account constituted his taxable income or was being handled by him as a fiduciary. Even assuming that the deposited funds did belong to his clients, the Service has sought no information from petitioner with regard to any confidential communications between him and his unnamed clients. It has merely sought to obtain the bank's records. The only relationship between petitioner and the bank is that of debtor and creditor. The bank did not participate in the rendering of legal advice or service; it merely acted as a depository. Thus even if the funds belonged to petitioner's clients the attorney-client privilege would not cover petitioner's transactions with the bank (in the form of deposits, withdrawals, etc).

Petitioner has cited no cases holding that the attorney-client privilege protects the records of a bank, and we have discovered none. In *Baird* v. *Koerner*, 279 F. 2d 623 (C.A. 9) (cited Pet. 7), the court declined to require an attorney to reveal the identity of his client. Here, petitioner is attempting to prevent a

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an injunction against the bank (but not against officers of the the Internal Revenue Service). The United States could then bring an enforcement proceeding against the bank in which the petitioner could intervene. 375 U.S. at 449–450. This is the relief he sought against the bank in this case, and the trial court, after a full hearing on the merits, ruled against him. In the instant case the district court denied relief against the bank officer (as well as against the federal officers) on the ground that petitioner's claims have no merit. Since this decision was correct, we shall not further discuss whether the suit was properly maintainable against the federal officials.

third party (the bank) from disclosing information which he has conveyed to it. The Seventh Circuit has recently held that while an attorney can not be compelled to reveal the identity of his client (*Tillotson* v. *Boughner,* 350 F. 2d 663), the attorney could not clothe a bank's records (relating to same transaction) with the attorney-client privilege. *Schulze* v. *Rayunec,* 350 F. 2d 666, certiorari denied *sub nom. Boughner* v. *Schulze,* 382 U.S. 919.

In *Mauch* v. *Commissioner,* 113 F. 2d 555 (C.A. 3), the government showed that monies deposited in an attorney's bank accounts were not included in his income tax returns. The attorney claimed that the monies belonged to clients, whose names he refused to reveal. The court held that public policy would not permit the invocation of the privilege (merely to hide the identity of the putative clients) in these circumstances. In the instant case petitioner is not being asked to disclose the identity of his clients or any confidential communications, and there is nothing to indicate that the bank records would contain such information. Accordingly, the district court was correct in declining to enjoin the bank from producing the business records it maintained with regard to petitioner's accounts.

2. Petitioner contends that the district court should have enjoined production of the bank's records (as well as any further investigation of petitioner's tax returns), because he "was the subject of an arbitrary bad-faith Organized Crime investigation by the Internal Revenue Service in violation of Title 26 U.S.C." (Pet. 11–13). The record, however, does not bear out petitioner's factual assertions. The district

court took extensive testimony on this point (R. 43–412) and concluded that the present investigation was instituted in a perfectly routine fashion (R. 445–446, 448–449).[6] And the court of appeals observed that "the lengthy record amply supports [the district court's] * * * findings" (Pet. 16).

3. Finally, petitioner contends (Pet. 9–11) that the district court unduly restricted the subpoenas which petitioner had caused to be issued to various Internal Revenue Service personnel. This contention is also without merit. These subpoenas (R. 20–33) requested the production of the agents' diaries, work sheets, notes, etc., without regard to whether they were relevant to petitioner. The district court correctly ordered the agents to produce only those portions of the requested documents which related to petitioner. The United States Attorney filed an affidavit that all relevant portions had been produced, and petitioner was permitted to use these documents to cross-examine the agents. As the court of appeals stated in its opinion (Pet. 18):

> The nine subpoenae asked, among other records, for all diaries (official and personal) and work sheets covering four years, and all notes during attendance at various schools. The requests were made without limitation to matters

[6] An agent in the Audit Division testified that he selected petitioner's 1962 return for audit because of a routine Treasury report concerning petitioner's deposits of large amounts in bills of $100 or more in denomination (R. 300–302). Another agent in the Audit Division testified that he selected petitioner's 1963 return because of "extraordinary medical expenses" and questions relating to petitioner's business income and expenses (R. 306–308).

related to appellant. The district judge, faced with what might well be considered frivolous requests, exercised admirable patience in giving every opportunity to appellant to designate documents. The appellant failing to do this, the judge ordered all relevant documents to be produced. Appellant was allowed to place them in evidence and recall witnesses for further questioning based on the documents. Clearly there was no error and only such partiality as indulged the appellant.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
RICHARD C. PUGH,
Acting Assistant Attorney General.
RICHARD B. BUHRMAN,
JOHN M. BRANT,
Attorneys.

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